ESTTA Tracking number: **ESTTA679393**

Filing date: **06/22/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215657
Party	Defendant GoYoGo Frozen Yogurt LLC
Correspondence Address	DENNIS F GLEASON JARDIM MEISNER & SUSSER PC 30B VREELAND RD STE 201 FLORHAM PARK, NJ 07039 UNITED STATES dgleason@jmslawyers.com
Submission	Opposition/Response to Motion
Filer's Name	Dennis F. Gleason
Filer's e-mail	dgleason@jmslawyers.com
Signature	/Dennis F. Gleason/
Date	06/22/2015
Attachments	GYG resp mot to compel discov.pdf(442340 bytes) GYG DFG decl resp mot to compel discov.pdf(257506 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No. 86060111
For the mark: 

Filed September 10, 2013

In the Matter of Trademark Application Serial No. 86037364
For the mark: GoYoGo Frozen Yogurt
Our Ingredients, Your Creation
Filed August 14, 2013

GOYA FOODS, INC., Opposer, v. GOYOGO FROZEN YOGURT LLC, Applicant.	Opposition No. 91215657

RESPONSE OF APPLICANT TO OPPOSER'S MOTION TO COMPEL DISCOVERY

GoYoGo Frozen Yogurt LLC ("GoYoGo Frozen Yogurt" or "Applicant") urges the Board to deny the motion of Goya Foods, Inc. ("Goya Foods" or "Opposer") to compel discovery.

PRELIMINARY STATEMENT

A few days before it was required to make its pretrial disclosures, Opposer moved to compel discovery in the way of responses to two interrogatories and seven requests to admit.

The motion is part of a procedural ploy to "stop the clock" and to buy time, ostensibly because Opposer is not prepared at this time to offer its proofs at trial. This is supported by the

fact that on the very day it was required to make its pretrial disclosures, Opposer filed a motion to reset deadlines.

As to the merits of the motion, with regard to the requests to admit, Opposer erects a straw man argument. That is to say, although Applicant sells "frozen yogurt" under its marks, Opposer seeks discovery of "yogurt" which neither Applicant nor Opposer sells and is otherwise not part of this proceeding. Opposer, nonetheless, insists on pressing for this irrelevant discovery.

With regard to the interrogatories, in the instance where Opposer asks how much Applicant has spent on advertising, the response indicates that the information would be produced, where available. Opposer will not, however, accept that the information is not available as there are no breakdowns for separate expenses in a small start-up company. As to the other interrogatory, Opposer asks a question that makes little sense and therefore cannot be reasonably responded to.

STATEMENT OF RELEVANT FACTS

Opposer served its written discovery requests, including first set of interrogatories and first set of requests for admission in June 2014. (Declaration of Jason DeFrancesco, dated June 3, 2015 ("DeFrancesco Decl."), Exhibits 1 and 2.) Applicant responded to the requests for admissions on July 14 and the first set of interrogatories on July 29, 2014. (DeFrancesco Decl., Exhibits 3 and 4.)

In a letter dated June 23, 2014, counsel for Applicant requested that Opposer provide a copy of all documents identified in Opposer's mandatory disclosures. (Declaration of Dennis F. Gleason, dated June 22, 2015 ("Gleason Decl."), Exhibit A.)

In response, counsel for Opposer "rejected" the request to produce documents identified in Opposer's mandatory disclosures. (Gleason Decl., Exhibit B.)

Counsel for Applicant replied that the Board encourages the production of documents, citing to authority. (Gleason Decl., Exhibit C.) No documents were ever produced however.

By letter dated August 18, 2014, counsel for Opposer identified discovery responses with which Opposer took issue and requested a "meet and confer" in lieu of a written letter response to the August 18 letter. (DeFrancesco Decl., Exhibit 5.)

On August 27, 2014, counsel for the parties in a conference call addressed various issues in discovery.

Applicant advised Opposer that certain requests to admit seeking information on "yogurt" were objectionable because Applicant sells "frozen yogurt" which is a product different from "yogurt." (Gleason Decl. at ¶3.) Also in that conference call, counsel for Opposer refused to produce documents identified in Opposer's mandatory disclosure. (DeFransesco Decl., Exhibit 6.)

As a result of the conference call, counsel for Applicant agreed to revisit various responses.

Thereafter, amended responses by Applicant were served on Opposer on December 10, 2014. (DeFrancesco Decl., Exhibits 7 and 8.)

Counsel for Opposer, by letter dated December 30, 2014, identified issues he had with the amended responses noting "[a]s a last ditch effort, I can agree to attempt to discuss these matters by phone and to narrow the issues in a motion to compel." (DeFrancesco Decl., Exhibit 9 at p. 5)(emphasis added.)

Of particular note, the December 30 letter made no mention of issues Opposer had with the response to interrogatory no. 6. (*Id.*)

A second meet and confer conference call was held by counsel on January 14, 2015. In that call, the items in the December 30 were discussed (but not interrogatory no. 6). Among the topics discussed were the requests to admit, in particular request nos. 17-23. (Gleason Decl. at ¶7.)

Ignoring the admonishment in the January 27 meet and confer that the requests to admit for "yogurt" had nothing to do with the issues in the proceeding because Applicant sells "frozen yogurt" not "yogurt" which is very different product, counsel for Opposer continued to press for responses on whether "yogurt" was "related to" certain other food products. Counsel for Applicant reiterated that given the ambiguous nature of the term "related to" it was open multiple interpretations and Applicant could not respond, putting aside that "yogurt" has no part in this action. (Gleason Decl. at ¶7.)

Also in that December 30 conference call, counsel for Applicant repeated that it had made multiple requests for documents identified in mandatory disclosures (both by letter and more formal document request) and Opposer continued to ignore those requests. Counsel for Opposer stated that he would look into that. (Gleason Decl. at ¶8.) In a letter dated January 28, 2015, the request was renewed and Opposer was asked to produce the requested documents by February 3, 2015 and if not to explain why. (Gleason Decl., Exhibit D.) Opposer neither responded to the letter nor produced the documents. (Gleason Decl. at ¶9.)

Shortly after the January 14 conference call, Applicant served amended discovery responses consistent with what was discussed. (DeFrancesco Decl., Exhibits 10 and 11.)

Opposer then waited TEN WEEKS before writing to Applicant on April 8, raising the same arguments regarding requests to admit 17-23. (DeFrancesco Decl., Exhibit 12.) The April 8 letter made no effort to explain why Opposer waited several months before addressing the issues in the letter.

The April 8 letter further observed: "In view of the fact that the deadline to discovery is approaching [on April 22], please provide us your intention of satisfying these requests as originally understood, or state that you will not revise, in which case we shall seek immediate attention from the Board." (*Id.*)(emphasis added.)

Less than a week later, counsel for Applicant responded. First, Applicant once again repeated that Opposer had produced no documents identified in the mandatory disclosures. Indeed, Opposer refused to even acknowledge its shortcomings. Second, Applicant restated that the term "related" in the context of the request was ambiguous and properly objectionable. (DeFrancesco Decl., Exhibit 13.) Lastly, in response to the statement that interrogatory nos. 19 and 20 were "unanswered," it was pointed out that they had been answered as objectionable.

After the passage of another six weeks and notwithstanding the representation in April that if the responses were not revised that Opposer would "seek immediate attention from the Board," counsel for Opposer repeated almost word for word the same arguments regarding requests to admit 17-23 which were addressed earlier. (DeFrancesco Decl., Exhibit 13.)(emphasis added.)

One week later, on June 3, before a response by Applicant could be sent, Opposer filed a motion to compel discovery and suspend proceedings.

By directive of the Board, Opposer was to make pretrial disclosures June 8.[1]

[1] The actual deadline for Opposer's pretrial disclosures was June 6 which fell on a Saturday.

Opposer filed this motion on June 8.

ARGUMENT

POINT I

APPLICANT HAS PROPERLY AND CORRECTLY OBJECTED TO THE REQUESTS TO ADMIT

Opposer challenges the sufficiency of responses to requests to admit nos. 18-23. The general format of each of those requests reads: "Admit that yogurt is related to [_____]," with varied food products in the blank space. (DeFrancesco Decl., Exhibit 11.) The response by Applicant to each includes the objection that the request is not likely to lead to admissible evidence and that the term related in the context is vague and ambiguous.

Applicant sells "frozen yogurt." Frozen yogurt is a product distinct from yogurt, yet Opposer continues a wasteful campaign to insist on asking about a product that has nothing to do with the trademark registration or either GoYoGo Frozen Yogurt or Goya Foods. See 21 CFR §131.200 (2001); see also http://aboutyogurt.com/index.asp?bid=28 (last visited June 12, 2015.). This is why the requested information will not likely lead to admissible evidence. Opposer has never offered an explanation how or why discovery on "yogurt" is likely to lead to admissible evidence.

In a meet and confer conference call in January 2015, counsel was advised that "yogurt" is not part of this case; yogurt is not a product sold by GoYoGo Frozen Yogurt. Certainly Opposer has not come forward with how a product not sold by either party is worthy of consideration in the case. Assuming there is some relevant relationship between "yogurt" and

other food products, its findings do little or nothing towards resolution of the dispute between the parties. That is an independent ground for objection, which Opposer has not disputed[2].

Turning to the focus of Opposer's motion, accepting for the sake of argument that yogurt is a food product that is relevant to this opposition proceeding, Opposer's statement that "the term 'related' in trademark matters [] is commonly understood to mean of a type which may emanate from a single source and [is] logically related to the basic substantive issues in the case" is somewhat circular, if not confusing standing alone. Opposer's use of the word "related" in the context of the requests to admit at issue is open to multiple interpretations, which have not been clarified or amended. For instance: Are the products related because they are sometimes sold as packaged goods? Are the products related because they contain all the same ingredients? Are the products related because they are sold by Applicant and Opposer? The variations as to what is meant by "related" are too numerous to list.

The notion that Opposer relies on the listings of "fruit beverages" and "frozen confections" identified in the Trademark ID manual to better define the term is unavailing.[3] Those listings do not overcome the fact that any comparison to yogurt products (related or otherwise) is meaningless where GoYoGo Frozen Yogurt does not sell yogurt.

---

[2] Inasmuch as discovery is closed, and Opposer waited months after the close of discovery before bringing the issue to the Board, Opposer is without recourse to serve new requests to admit.

[3] Opposer implies that Applicant "agreed to answer [these particular requests to admit] according to Trademark Law and [Opposer's] 'better defining the vague and undefined' terms," citing to an April 28, 2014 email. (DeFrancesco Decl., Exhibit 6.) What Opposer fails to acknowledge is that its counsel made the same argument in its letter dated December 30, 2014 (DeFrancesco Exhibit 9), that the issues was discussed in a January 2015 meet and confer conference call, and that Applicant served amended responses in January 2015, then dropped the particulars of that argument in April 2015 (DeFrancesco Decl., Exhibit 12) and resurrected the argument again in May 2015. (DeFrancesco Decl., Exhibit 14.) In all instances, Applicant reiterated that the terms were not sufficiently defined.

The citation to *Slim N' Trim, Inc. v. Mehadrin Dairy Corp.* does not aid in the determination here of whether certain products are "related." That dispute focused on the cancellation of a mark which the identified goods included yogurt. The petitioner, whose mark was used in the sale of yogurt, contested the mark on the grounds that its mark was confusing similar to marks of the petitioner, whose goods under its senior mark also included yogurt.

In this action there is no reasonable basis to find that Applicant or Opposer sells the same product. There is no record to even suggest that Opposer sells frozen yogurt – or even yogurt for that part.

In sum, the requests to admit seek discovery for products not part of this action.

POINT II

THE RESPONSES TO INTERROGATORIES OF APPLICANT HAVE BEEN SUFFICIENTLY ANSWERED

Opposer takes issue with responses to interrogatory nos. 6 and 19. Neither objection is worthy of consideration.

These are issues that were raised and presumed to have been satisfactorily addressed as part of the meet and confer process. This is underscored by the fact that there is no mention of these or any other interrogatories in the May 27, 2015 letter of counsel for Opposer, the last letter identifying the outstanding discovery issues. Simply put, Opposer is using its feigned dispute on interrogatory responses as a platform to stall making pretrial disclosures.

Turning to interrogatory no. 6, Opposer seeks the dollar amount spent by Applicant on advertising and promotion. (DeFrancesco Decl., Exhibit 10.) Following the meet and confer conferences, the response was amended to and sets for that the information, subject to a protective order will be provided "to the extent that it is maintained." (*Id.*) At this time, there is

nothing to produce as Applicant, which is a start-up company that only began selling frozen yogurt in late 2013 does not have records broken down as to the particulars requested.

Another significant point here: Opposer cannot be trusted to abide by any protective order in this case where Applicant discloses confidential information. It has already violated a confidentiality order. When requested to provide annual gross sales in interrogatory no. 5(c), Applicant provided an amended answer clearly designating

> [T]he following information is provided under the provisions for protecting confidentiality of information revealed during Board proceedings, under the designation as "Trade Secret/Commercial Sensitive."

(*Id.*, at no. 5)(emphasis added.)

In the face of that clear and unambiguous notice, Opposer has deliberately and intentionally decided to make public as part of its motion, contrary to the confidential designation, the annual sales dollars disclosed.[4] (*Id.*) Apparently Opposer feels that it can complain that commercially sensitive information should be produced by Applicant but that Opposer does not have to abide by protective orders.

Interrogatory no. 19 seeks a specific date of when Applicant "first became aware of any of Opposer's marks." (DeFrancesco Decl., Exhibit 10.) Applicant has properly objected on multiple grounds, including that a corporation is unable to determine when "it became aware" of a multitude of marks. The request, moreover, is unnecessary and duplicative of other discovery which is ignored by Opposer.

[4] As the barn door has been left open (or whatever other saying is appropriate), there is little that Applicant can do to undo the damage done. Applicant, reserves the right to seek sanctions for the violation.

In request to admit no. 46, subject to the same objections, Applicant admitted that it "knew of one or more of Opposer's Marks before adopting or applying to register the marks being opposed." (DeFrancesco Decl., Exhibit 11 at no. 46.) Therefore, it has been established that one or more marks of Opposer were brought to Applicant's attention before the application. This only begs the question: What more does Opposer expect to obtain? The answer is nothing.

CONCLUSION

For all of the reasons stated more fully above, the motion of Opposer to compel discovery and to suspend proceedings should be denied.

Respectfully submitted,

June 22, 2015

By: s/Dennis F. Gleason
Dennis F. Gleason

JARDIM, MEISNER & SUSSER, P.C.
30B Vreeland Road, Suite 201
Florham Park, NJ 07039

Attorneys for Applicant
GoYoGo Frozen Yogurt LLC

CERTIFICATE OF SERVICE

I, Dennis F. Gleason, certify that on June 22, 2015, a copy of the applicant's response to the opposer's motion to compel discovery and suspend the matter was served by first class mail on

Stephen L. Baker
Baker and Rannells, PA
575 Route 28, Suite 102
Raritan, NJ 08869

June 22, 2015

s/Dennis F. Gleason
Dennis F. Gleason

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No. 86060111
For the mark: 

Filed September 10, 2013

In the Matter of Trademark Application Serial No. 86037364
For the mark: GoYoGo Frozen Yogurt
Our Ingredients, Your Creation
Filed August 14, 2013

GOYA FOODS, INC., Opposer, v. GOYOGO FROZEN YOGURT LLC, Applicant.	Opposition No. 91215657

DECLARATION OF DENNIS F. GLEASON IN SUPPORT OF RESPONSE OF APPLICANT TO OPPOSER'S MOTION FOR EXTENSION OF TIME

I, Dennis F. Gleason, declare:

1. I am an attorney at law admitted to practice in New Jersey and a partner in the firm Jardim, Meisner & Susser, PC, counsel for Applicant GoYoGo Frozen Yogurt LLC.

2. I make this declaration is support of the response of Applicant to Opposer Goya Foods, Inc.'s motion to compel discovery.

3. Attached as Exhibit A is copy of a letter Dennis F. Gleason to Stephen L. Baker, dated June 23, 2014.

4. Attached as Exhibit B is copy of an email chain between Dennis F. Gleason and Stephen L. Baker, the most recent dated July 3, 2014.

5. Attached as Exhibit C is copy of a letter from Dennis F. Gleason to Stephen L. Baker, dated July 9, 2014.

6. The parties conducted a meet and confer by telephone conference on August 27, 2014. I advised counsel for Opposer that certain requests asking for discovery on "yogurt" were objectionable because Applicant sells "frozen yogurt" which is a product different from "yogurt."

7. The parties convened a second meet and confer conference call on January 14, 2015. As part of that conference, I reiterated that the term "related to" in the context of the requests to admit of Opposer is subject to multiple interpretations and Applicant could not reasonably respond to requests 17-23, notwithstanding that fact that Applicant sells frozen yogurt and does not sell yogurt, a different product.

8. In that same conference call, I again pointed out that Opposer had failed to produce any documents, especially those identified in Opposer's mandatory disclosures. Counsel for Opposer said he would follow up on that. No documents were ever produced.

9. Attached as Exhibit D is a copy of a letter from Dennis F. Gleason to Jason DeFrancesco, dated January 28, 2015. No response was ever received to this letter.

I declare that the statements made by me above are true. I understand that if any of the statements are knowingly false, I may be subject to punishment.

June 22, 2015

By: s/Dennis F. Gleason
Dennis F. Gleason

JARDIM, MEISNER & SUSSER, P.C.
30B Vreeland Road, Suite 201
Florham Park, NJ 07039

Attorneys for Applicant
GoYoGo Frozen Yogurt LLC

EXHIBIT A

Jardim, Meisner & Susser, P.C.
ATTORNEYS AT LAW

30B Vreeland Road, Suite 201
Florham Park, NJ 07932
office: (973) 845-7640
fax: (973) 845-7645
web: jmslawyers.com

June 23, 2014

VIA EMAIL AND FIRST CLASS MAIL

Stephen L. Baker, Esq.
Baker and Rannells, PA
575 Route 28, Suite 102
Raritan, NJ 08869

Re: Goya Foods, Inc. v. GoYoGo Frozen Yogurt LLC
Opposition No. 91215657

Dear Steve:

On behalf of GoYoGo Frozen Yogurt, LLC, kindly produce within the next ten days a copy all documents identified in the initial disclosures of Goya Foods, Inc., dated June 12, 2014.

When providing the documents, kindly include an identification of the materials keyed to the categories in the initial disclosure.

If you should have any questions, please feel free to contact me.

Very truly yours,

DENNIS F. GLEASON

EXHIBIT B

Dennis Gleason

From: Steve Baker <S.Baker@br-tmlaw.com>
Sent: Thursday, July 3, 2014 10:08 AM
To: Margaret Davis-Engel
Cc: Dennis Gleason; R. McGonigle; K. Hnasko
Subject: RE: Goya Foods, Inc. v. GoYoGo Frozen Yogurt

I am unaware of any TTAB or FRE rule that requires a substantive response to your letter of June 23, 2014. Accordingly, you demand is rejected.

Steve

Stephen L. Baker

BAKER & RANNELLS, PA
INTELLECTUAL PROPERTY ATTORNEYS

Baker and Rannells, PA
575 Route 28, Suite 102
Raritan, NJ 08869
Telephone: (908) 722-5640
Facsimile: (908) 725-7088
E-mail: s.baker@br-tmlaw.com
www.tmlawworldwide.com

From: Margaret Davis-Engel [mailto:Margaret@jmslawyers.com]
Sent: Monday, June 23, 2014 3:45 PM
To: Steve Baker
Cc: Dennis Gleason
Subject: Goya Foods, Inc. v. GoYoGo Frozen Yogurt

Please see attached correspondence with regard to the above matter. Original to follow via U.S. Mail.

Jardim Meisner & Susser, P.C.
ATTORNEYS AT LAW

Margaret Davis-Engel
Legal Assistant
Jardim, Meisner & Susser, P.C.
30B Vreeland Road, Suite 201
Florham Park, NJ 07932
Phone: 973-845-7640
Fax: 973-845-7645
Margaret@JMSLawyers.com
www.jmslawyers.com

EXHIBIT C

Jardim, Meisner & Susser, P.C.
ATTORNEYS AT LAW

30B Vreeland Road, Suite 201
Florham Park, NJ 07932
office: (973) 845-7640
fax: (973) 845-7645
web: jmslawyers.com

July 9, 2014

VIA EMAIL AND FIRST CLASS MAIL

Stephen L. Baker, Esq.
Baker and Rannells, PA
575 Route 28, Suite 102
Raritan, NJ 08869

Re: Goya Foods, Inc. v. GoYoGo Frozen Yogurt LLC
Opposition No. 91215657

Dear Steve:

I am replying to your email dated July 3, 2014.

First, I believe in the haste of responding to my earlier letter, you make a reference to the "FRE," which I presume you mean to be the Federal Rules of Evidence. I take that this was an error on your part and you intended to cite to the Federal Rules of Civil Procedure.

That aside, while there is no "rule" that specifically mandates the production of documents disclosed in initial disclosures, I call your attention to the *Influance v. Zuker*, 88 USPQ2d 1859 (TTAB 2008). More particularly footnote 4 which reads:

> The most efficient means of making initial disclosures of documents, and the option the Board encourages parties to use, is to actually exchange copies of disclosed documents, rather than merely identifying their location.

I therefore encourage you to revisit your view and subscribe to the authority of *Influance* and produce all the documents identified in the Rule 26 disclosures of Goya, with an identification of the materials keyed to the categories in the initial disclosures.

If you should have any questions, please feel free to contact me.

Very truly yours,

DENNIS F. GLEASO

EXHIBIT D

Jardim, Meisner & Susser, P.C.
ATTORNEYS AT LAW

30B Vreeland Road, Suite 201
Florham Park, NJ 07932
office: (973) 845-7640
fax: (973) 845-7645
web: jmslawyers.com

January 28, 2015

VIA EMAIL AND FIRST CLASS MAIL

Jason DeFrancesco, Esq.
Baker and Rannells, PA
575 Route 28, Suite 102
Raritan, NJ 08869

Re: Goya Foods, Inc. v. GoYoGo Frozen Yogurt LLC
Opposition No. 91215657

Dear Jason:

Following up our January 14 telephone conversation, as I restated, Goya has not produced any documents to GoYoGo Frozen Yogurt.

In particular, I note that no documents identified in Goya's mandatory disclosures have been produced, notwithstanding (a) the requirement to produce under Rule 26 and (b) the materials have been requested in Applicant's request to produce documents (Req. no. 1).

Please advise if Goya will produce the documents not later than February 3 and, if not, why not.

If you should have any questions, please feel free to contact me.

Very truly yours,

DENNIS F. GLEASON